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In the Supreme Court of the United States

OCTOBER TERM, 1973

GOLDEN STATE BOTTLING COMPANY, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	2
A. Background	2
B. The present proceeding	5
C. The decision of the court of appeals	9
Summary of argument	10
Argument	15
I. The Board properly found that All American was a successor employer for purposes of the National Labor Relations Act and that it acquired Golden State's business with knowledge that Golden State had unlawfully discharged an employee and had failed to remedy that unfair labor practice	16
A. All American is a successor employer for purposes of the National Labor Relations Act	16
B. Substantial evidence supports the Board's finding that All American acquired Golden State's business with knowledge of Golden State's unremedied unfair labor practices	18
II. A successor employer who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the National Labor Relations Act and has failed to remedy that unfair labor practice may be required to reinstate the employee with back pay	21

508-527—73——1

Argument—Continued Page

A. The Board has authority under Section 10(c) of the Act to issue remedial orders encompassing a successor employer who acquires the employing entity with knowledge of the predecessor's unremedied unfair labor practice 22

B. Rule 65(d) of the Federal Rules of Civil Procedure does not bar the Board from requiring a successor employee to remedy its predecessor's unfair labor practices 30

III. The Board properly made Golden State jointly liable with All American for back pay accruing after the sale 34

IV. The Board properly determined the amount of back pay due the unlawfully discharged employer and ordered that he be reinstated as a distributor 38

Conclusion 42

Appendix A 43

Appendix B 44

CITATIONS

Cases:

Alexander Milburn Co., 78 NLRB 747 8

Behrens v. *Skelly*, 173 F. 2d 715 31

Darlington Mfg. Co. v. *National Labor Relations Board*, 397 F. 2d 760, certiorari denied, 393 U.S. 1023 ..... 25, 37

Interstate Circuit, Inc. v. *United States*, 306 U.S. 208 21

Interstate Commerce Commission v. *Western N.Y. & P.R. Co.*, 82 Fed. 192 ..... 3, 32

Cases—Continued

	Page
John Wiley & Sons v. *Livingston*, 376 U.S. 543	8, 13, 28, 29, 30
J. R. Clark Co. v. *Jones & Laughlin Steel Corp.*, 186 F. Supp. 22, affirmed, 288 F. 2d 279	32
Local 761, Int'l Union of Electrical Workers v. *National Labor Relations Board*, 366 U.S. 667	8
Lucy v. *Adams*, 224 F. Supp. 79, affirmed *Sub nom. McCorvey* v. *Lucy*, 336 F. 2d 892	32
Mastro Plastics Corp., 136 NLRB 1342	39
Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270	12, 22
McCann Steel Co., 203 NLRB 115, 83 LRRM 1175	39
Nathanson v. *National Labor Relations Board*, 344 U.S. 25	37
National Labor Relations Board v. *Bell Aircraft Corp.*, 206 F. 2d 235	40
National Labor Relations Board v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234	34
National Labor Relations Board v. *Brown & Root, Inc.*, 311 F. 2d 447	41
National Labor Relations Board v. *Burns*, 406 U.S. 272	10, 16, 17, 29, 32
National Labor Relations Board v. *Charley Toppino and Sons*, 385 F. 2d 94	41
National Labor Relations Board v. *Dorn's Transportation Co.*, 405 F. 2d 706	21
National Labor Relations Board v. *East Texas Steel Castings Co.*, 281 F. 2d 686	41
National Labor Relations Board v. *Lion Oil Co.*, 352 U.S. 282	22
National Labor Relations Board v. *Missouri Transit Co.*, 250 F. 2d 261	37

Cases—Continued

Page

National Labor Relations Board v. *Mooney Aircraft Inc.*, 375 F. 2d 402, certiorari denied, 389 U.S. 859 41

National Labor Relations Board v. *Rice Lake Creamery Co.*, 365 F. 2d 888 41

National Labor Relations Board v. *Wallick*, 198 F. 2d 477 21

Packard Motor Car v. *National Labor Relations Board*, 330 U.S. 485 8

Perma Vinyl Corp., 164 NLRB 968 ..... 7, 8, 12, 21, 24, 25, 29, 33

Phelps Dodge Corp v. *National Labor Relations, Board*, 313 U.S. 177 ..... 13, 22, 23, 36

Radio Officers' Union v. *National Relations Board*, 347 U.S. 17 38

Regal Knitwear Co. v. *National Labor Relations Board*, 324 U.S. 9 ..... 12, 14, 23, 24, 30, 31, 35

Rivera v. *Lawton*, 35 F. 2d 823 32

Rodman v. *Rogers*, 109 F. 2d 520 32

Southport Petroleum Co. v. *National Labor Relations Board*, 315 U.S. 100 ..... 23, 24

Symns Grocer Co., 109 NLRB 346 8

Textile Workers v. *Darlington Mfg. Co.*, 380 U.S. 263 ..... 14, 36

Thomas Engine Corp., 179 NLRB 1029, affirmed *sub nom. United Automobile Workers* v. *National Labor Relations Board*, 442 F. 2d 1180 ..... 20, 27

United Gilpin Corp. v. *Wilmore*, 100 Colo. 453, 68 P 2d 34 31

United States v. *Dean Mfg. Co.*, 71 F. Supp. 96 31

United States Pipe and Foundry Co. v. *National Labor Relations Board*, 398 F. 2d 544 ..... 12, 21, 25, 26, 27

Cases—Continued Page

Virginia Electric & Power Co. v. *National Labor Relations Board*, 319 U.S. 533 23

Walling v. *Reuter*, 321 U.S. 671 33

Wirtz v. *Ocala Gas Co.*, 336 F. 2d 236 20

Wright v. *County School Board*, 309 F. Supp. 671, affirmed, 407 U.S. 451 32

Statutes, Regulations and Rule:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2, 43

Section 2(3) 39, 40

Section 7 ..... 25, 30

Section 8(a)(1) 3, 43

Section 8(a)(3) 3, 36, 43

Section 8(a)(5) 36

Section 8(d) 29, 30

Section 10(c) 12, 21, 22, 23, 24, 43

Labor Management Relations Act 61 Stat. 156, Section 301, 29 U.S.C. 185 28

29 C.F.R. 102.52–102.54 5

Federal Rules of Civil Procedure, Rule 65(d) 13, 14, 21, 30, 31, 33, 34, 43

Miscellaneous:

Comment, *Successor Employer's Obligation to Remedy Unfair Labor Practices*, 68 Colum. L. Rev. 1602 (1968) 21

Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L.Rev. 735 (1969) 21

ALI, *Restatement of Law—Judgments* § 89 (1942) 31

Cases—Continued

Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-36) is reported at 467 F. 2d 164. The supplemental decision and order of the National Labor Relations Board (Pet. App. 1-31; A. 56-59)[1] are reported at 187 NLRB 1017.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37-38) was entered on August 21, 1972. The petition for a writ of certiorari was filed on November 8, 1972, and granted on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "A." refers to the separate Appendix to the Briefs.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Federal Rules of Civil Procedure are set forth in Appendix A, *infra*, p. 43.

QUESTIONS PRESENTED

1. Whether the Board properly found that All American was a successor employer for purposes of the National Labor Relations Act and that it acquired Golden State's bottling business with knowledge that Golden State had unlawfully discharged an employee and had failed to remedy that unfair labor practice.

2. Whether a successor employer who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the National Labor Relations Act and has failed to remedy that unfair labor practice may be required to reinstate that employee with back pay.

3. Whether the Board properly made Golden State jointly liable with All American for the backpay due the unlawfully discharged employee.

4. Whether the Board properly determined the amount of back pay due the unlawfully discharged employee and ordered him reinstated as a "distributor."

STATEMENT

A. BACKGROUND

Golden State Bottling Co., Inc. (hereafter "Golden State" or the "predecessor") operated a soft drink bottling plant and sold and distributed soft drinks at wholesale under the name of "Pepsi-Cola Bottling Co.

of Sacramento" (147 NLRB 410, 415).[2] On June 10, 1964, the Board found that Golden State violated Section 8(a) (3) and (1) of the National Labor Relations Act by discharging Kenneth L. Baker, a driver-salesman, on August 16, 1963, because of his union activities. The Board ordered Golden State and its officers, agents, successors, and assigns to offer Baker immediate and full reinstatement to his former or substantially equivalent position, and to make him whole for any loss of earnings from the date of his discriminatory discharge until the date of his reinstatement (147 NLRB 410). On December 2, 1965, the court below enforced the Board's order with respect to Baker. 353 F. 2d 667.[3]

Late in 1964, several months after the Board's decision, Golden State decided to convert its most capable driver-salesmen to distributors.[4] On October 1, 1964, Golden State offered the first distributorship contract to Donald Thorne, who was then its most successful driver-salesman and had been third in sales while Baker

[2] Golden State had other business interests in addition to the bottling business (A. 124).

[3] However, due to a delay in the court's disposing of the Board's petition for rehearing on a portion of the court's decision unrelated to Baker, a final decree was not entered until November 27, 1968 (A. 57; 401 F. 2d 454).

[4] Under the terms of their contracts, instead of receiving the salary and commission previously paid to them as driver-salesmen, the distributors purchased the products from Golden State at a discount and realized, as net profit, the difference between this and other costs and the resale price to the customers. Golden State also enlarged the previous routes of the salesmen to include several high-volume stops in the distributors' routes (Pet. App. 17). The salesmen offered distributorships were given the option of remaining as driver-salesmen (Pet. App. 18).

508-527—73——2

was employed (Pet. App. 17–18; A. 153, 214). By January 1968, Golden State had converted 12 of its 18 salesmen to distributors (Pet. App. 18–19; A. 153–159).

On January 31, 1968, Golden State sold the bottling company and all of its assets to All American Beverages, Inc. (hereafter "All American" or the "successor") as a going concern (Pet. App. 6; A. 60–80). All American continued the bottling business in the same plant at the same location, without any hiatus or alteration in the method of operation. All American acquired the machinery, buildings, accounts receivable, trade name, and real estate of Golden State's bottling business, as well as a covenant by Golden State's principals not to compete with All American. All American employed all but 2 or 3 of Golden State's approximately 50 employees. The contracts of all of the 12 distributors were assigned to All American, and they continued to sell the same products to the same customers. All of Golden State's supervisory and managerial personnel continued to work for All American, including Eugene Schilling, Secretary and general manager of Golden State, who was hired by All American as general manager and "president" of the bottling operation (Pet. App. 8–9; A. 60–81, 85–87, 132, 138–142, 143–144, 240–241). In his managerial capacities for All American, Schilling continued to direct the daily operations of the bottling company in the same manner as he had for Golden State (Pet. App. 5–6; A. 132, 168–169).

B. THE PRESENT PROCEEDING

Unaware of the sale to All American, the Board's Regional Director served on Golden State a back pay specification[5] on September 30, 1969, detailing the amount of back pay accrued to Baker from the date of his unlawful discharge on August 16, 1963,[6] to June 30, 1969 (A. 1–6). In its answer to the back pay specification,[7] dated November 19, 1969, Golden State made no mention of the sale of the bottling company to All American 21 months earlier, but, rather, asserted that it had validly offered Baker reinstatement on December 11, 1968 (A. 7–12).[8] The Regional Director thereafter learned of the sale to All American, and, on December 19, 1969, he issued a new back pay specification which was served on both Golden State and All American and named the latter as a successor to Golden State within the meaning of the Board's original order (A. 14–35).

In their answer to the new back pay specification, Golden State and All American admitted that, in January 1968, the business had been sold to All Amer-

[5] See 29 C.F.R. §§ 102.52–102.54.

[6] Baker was discharged by Eugene Schilling. 147 NLRB at 418.

[7] The answer was verified, "under penalty of perjury," on November 24, 1969, by E. J. Crofoot, as president of Golden State (App. B, *infra*, pp. 44–45).

[8] The offer was made by Schilling, as "President" of "Pepsi-Cola Bottling Co.," on December 11, 1968 (A. 91). The answer to the original back pay specification indicates that the offer was made on behalf of Golden State (A. 7). At that time, Schilling no longer had any authority to represent Golden State, and the latter, having sold the business, was in no position to offer Baker his former job (Pet. App. 14, 24–25; A. 196–197).

ican, but denied that All American was liable for any back pay and denied that Golden State was liable for back pay after the January 1968 sale of the bottling business to All American (A. 38–46). The case proceeded to hearing before a Trial Examiner, with Golden State and All American participating through counsel (Pet. App. 4; A. 103–104). Based upon the evidence adduced at the hearing, the Examiner found, and the Board agreed,* that:

1. Although All American "was a bona fide purchaser for value unconnected with Golden State," it had, on and after January 31, 1968, continued the bottling business of Golden State without interruption and without substantial change in method of operation, employee complement, or supervisory and managerial personnel; thus All American was a successor employer for purposes of the Act (Pet. App. 8–9).

2. All American had knowledge, at or before the date of the transfer of operations, of the Board's unfair labor practice proceeding against Golden State (Pet. App. 16–17). In making this finding, the Examiner relied on the fact that none of the officials of All American appeared as witnesses during the back pay hearing to deny knowledge, nor was their absence explained (Pet. App. 16). The Board, accepting the Trial Examiner's ruling, discredited the denials of Schilling and Golden State's president, Crofoot, that they had advised All American of the Board's unfair

*The Board adopted the findings, conclusions, and recommended order of the Examiner (A. 58).

labor practice decision prior to the transfer (Pet. App. 13, 16).[10]

The Board followed its decision in *Perma Vinyl Corp.*, 164 NLRB 968, in which it had held that a successor who acquires a business with knowl-

[10] The Examiner stated that Schilling and Crofoot had attempted to conceal the transfer to All American from both the Board and the court of appeals (Pet. App. 13–14). The Examiner noted that, in November 1968, Schilling signed a letter and substitution of attorneys, which was sent to the court below 9 months after the bottling business had been sold and Schilling's employment with Golden State had ended, as "General Manager" of "Golden State Bottling Company" (Pet. App. 13–14, A. 82–84). A month later Schilling, as "President" of "Golden State Bottling Company," executed the notice to employees required by the Board's order and sent a certified copy of the notice to the Board (Pet. App. 14, 24; A. 92–95). At the same time Schilling made an offer, on behalf of Golden State, to reinstate Baker as a driver-salesman (see p. 5, n. 8, *supra;* Pet. App. 14, 24–25). Similarly, the Examiner noted that Crofoot, on November 24, 1969, 21 months after the sale, verified Golden State's answer to the original back pay specification, which alleged that Golden State had offered reinstatement to Baker on December 11, 1968 (Pet. App. 14; p. 5, n. 7, *supra*).

The Examiner further found that, while Crofoot testified that he "hadn't remembered" the unfair labor practice case when asked by All American concerning pending litigation, Crofoot was responsible for settling all legal matters involving Golden State, and he had authorized the payment of substantial legal fees in connection with that case (Pet. App. 14–15; A. 107–109, 111, 114–115, 129). Finally, the Examiner found that, while both Schilling and Crofoot testified that Schilling played no part in the sale negotiations, their further testimony revealed that Schilling had participated in at least one of the negotiating sessions during which his own future with All American was discussed, met with an All American "operations man" on another occasion, and executed the sales contract as secretary of Golden State (Pet. App. 15; A. 72, 117–119, 163–168).

edge of his predecessor's unfair labor practice is responsible for remedying his predecessor's unlawful conduct (Pet. App. 10).[11] It issued a supplemental order requiring All American to offer Baker reinstatement as a distributor,[12] and, jointly and severally with Golden State, to pay Baker $16,497, with interest, as net back pay due for the period ending December 31, 1968, plus an undetermined amount of back pay from January 1, 1969, to the date of a vaild offer of reinstatement (Pet. App. 29).

The amount of Baker's back pay consisted of what he would have earned as a driver-salesman from August 16, 1963, the date of his unlawful discharge, to October 1, 1964, plus earnings as a distributor after that date until a valid offer of reinstatement is made to Baker, less his interim earnings. The Board found that, but for the unlawful discrimination against him, Baker would have been offered, and would have accepted, a distributorship contract on October 1, 1964

[11] The Board first imposed a back pay and reinstatement remedial obligation upon a *bona fide* successor in *Alexander Milburn Co.*, 78 NLRB 747. In *Symns Grocer Co.*, 109 NLRB 346, the Board reversed *Millburn*. However, further experience with the problem and the light cast upon it by this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (*infra*, pp. 28–30), led the Board, in *Perma Vinyl*, to return essentially to its original position. Cf. *Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 674; *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 492–493.

[12] The Board found that Schilling's December 1968 offer, on behalf of Golden State, to reinstate Baker as a driver-salesman was invalid, since Baker was entitled to reinstatement as a distributor, and Schilling had no authority to act for Golden State at that time (Pet. App. 24–25; p. 5, n. 8, *supra*).

(Pet. App. 19–20).[13] The Board calculated Baker's earnings as a distributor from the earnings of Donald Thorne, the employee most comparable to Baker in total sales prior to Baker's unlawful discharge (Pet. App. 21–23; A. 17, 25–26).

C. THE DECISION OF THE COURT OF APPEALS

A divided court of appeals enforced the Board's supplemental order (Pet. App. 32–36). The court sustained the Board's findings that All American was a successor employer to Golden State, and that All American took over the bottling company with knowledge of Golden State's unfair labor practice litigation. Accordingly, it concluded that (Pet. App. 33):

> On this record it was proper for the Board to hold All American responsible for remedying violations of the Act committed by its predecessor. * * *[14]

Moreover, the court upheld the Board's finding that Baker would have been offered, and would have accepted, a distributorship in October 1964, and agreed

[13] Baker had been Golden State's top salesman during the 14 months of his employment (A. 102A, 102B). Just prior to his discharge, Schilling told Baker that he was a good employee, doing good work (A. 144). Schilling also told Baker's replacement, Willeford, that Baker had been a good employee and he hoped that Willeford would be able to do as well as Baker (A. 211). Baker testified that he would have accepted an offer to become a distributor (A. 222).

[14] Without deciding whether the Board correctly held Golden State jointly and severally liable for back pay after the sale, the court found that "Golden State concedes it is liable for such wages" by virtue of Golden State's agreeemnt, subsequent to the sale, to indemnify All American for any back pay it owed to Baker (Pet. App. 33–34).

that the Board had properly determined the total amount of net back pay owed Baker (Pet. App. 34-35).

SUMMARY OF ARGUMENT

Our principal contention is that a "successor employer," who takes over its predecessor's business knowing that the predecessor has failed to remedy its unfair labor practice in discharging an employee, may be required to reinstate the employee with back pay. Preliminarily we show that All American is a "successor" for the purposes of the National Labor Relations Act and that it acquired Golden State's bottling business with knowledge of the unfair labor practice proceeding pending against Golden State.

I

A. In *National Labor Relations Board* v. *Burns*, 406 U.S. 272, this Court held that a security service, which took over its predecessor's contract and a number of the predecessor's employees, was a successor employer under Act, inheriting its predecessor's obligation to bargain collectively with the representative of those employees. All American is a successor, not only under the criteria set forth in the opinion of the Court in *Burns*, but also under the more stringent criteria suggested by the dissent in that case. All American acquired the machinery, buildings, accounts receivable, trade name, and real estate of the Golden State bottling business. It retained virtually all of Golden State's employees, including the 12 distributors, and all of Golden State's supervisory and managerial employees, including its general manager,

Schilling. Finally, All American continued to manufacture the same bottled products at the same plant, using the same machinery and equipment, and the products were distributed to the same customers.

B. There is ample evidentiary support for the Board's finding, sustained by the court below, that All American purchased Golden State's bottling business with knowledge that Golden State had discharged an employee, Kenneth Baker, in violation of the Act and had failed to remedy that unfair labor practice. Although Golden State officials Schilling and Crofoot testified that they did not inform All American of Golden State's unremedied obligation to Baker prior to the consummation of the sale on January 31, 1968, the Trial Examiner and the Board were warranted in rejecting these self-serving denials. There is evidence of a concerted effort by Crofoot and Schilling to mislead the Board and the court below by concealing the fact of the sale to All American. Crofoot's responsibilities as President of Golden State, and his actions prior to the the sale relating to this Board proceeding, make incredible his claim that he "hadn't remembered" this proceeding at the time of the sale. Moreover, Schilling, who was responsible for discharging Baker, was not only retained by All American in a managerial position, but he was in contact with All American prior to the completion of the sale. In these circumstances, Schilling's admitted knowledge of the unfair labor practice could properly be imputed to All American not merely after, but prior to, the sale.

II

There are sound bases in both law and policy for the Board's position that a successor employer, like All American, who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the Act and has failed to remedy that unfair labor practice, may be required to reinstate the employee with back pay. *Perma Vinyl Corp.*, 164 NLRB 968, enforced *sub nom. United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544 (C.A. 5).

A. Section 10(c) of the Act, which authorizes the Board to issue remedial orders against "any person named in the complaint," does not limit the Board to issuing orders directed only to the actual perpetrator of an unfair labor practice. The Section must be read in the light of " 'the provisions of the whole law, and * * * its object and policy.' " *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285. It permits the Board to issue orders which are binding upon "successors and assigns." *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9. Section 10(c) may also properly be construed to authorize the Board to issue orders encompassing a *bona fide* purchaser who continues the employing entity which was the locus of the unfair labor practices, where it acquires that entity with knowledge that the predecessor has failed to remedy those unfair labor practices.

Only the successor employer can reinstate to his former position an employee who has been discriminatorily discharged by the old employer. Moreover, since the old employer may be insolvent or his assets may

be difficult to reach, imposing liability for back pay on the successor employer may be the only way of insuring prompt and certain recovery of that sum. Accordingly, unless the successor employer is within the reach of the Board's remedial authority, the basic purpose of the Board's order—*i.e.*, "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal [practices]" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194)—would be defeated.

Requiring a successor employer to remedy its predecessor's unfair labor practice does not impose an undue hardship on it. Since liability is imposed on the successor only when it acquires the business with knowledge of the predecessor's unremedied unfair labor practices, the successor can negotiate an adjustment in the price it pays for the business, or an indemnity clause to cover its potential unfair labor practice liability.

The imposition of remedial responsibility on a successor employer is also in accord with *John Wiley & Sons* v. *Livingston*, 376 U.S. 543. The Court there recognized that "[t]he objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship * * *" (*id.* at 549).

B. Rule 65(d) of the Federal Rules of Civil Procedure is no obstacle to imposing on a successor em-

ployer the duty to remedy its predecessor's unfair labor practices. That Rule permits an injunction to bind persons in "privity," or identified in interest, with "the parties to the action." See *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14–15. Where a *bona fide* purchaser takes over the employing entity which was the locus of the predecessor's unfair labor practices, with knowledge that those unfair labor practices are unremedied, it has stepped into the predecessor's shoes to a sufficient extent to satisfy the requirements of Rule 65(d).

This conclusion does not impair the basic policy of Rule 65(d), to avoid granting "an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. * * *" *Regal Knitwear, supra*, 324 U.S. at 13. For, the Board makes no adjudication of the new employer's liability without according it a full opportunity at a hearing to present evidence on the questions whether it is in fact a successor and whether it had knowledge of the unremedied unfair labor practices. All American had such opportunity here.

III

The Board properly made Golden State, the predecessor employer, jointly liable with All American for back pay accruing after the sale. First, Golden State had agreed to idemnify All American for such liability. Second, while *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, holds it is not an unfair labor practice for an employer to liquidate its entire

business, even if the liquidation is motivated by vindictiveness toward the union, it does not follow that the employer may thereby relieve itself of all continuing liability for an unfair labor practice committed *prior to* the liquidation. Notwithstanding the sale, Baker continued to be adversely affected by Golden State's unfair labor practice. It is therefore appropriate that Golden State share the responsibility for reimbursing him for the monetary loss which he continues to incur.

IV

It is conceded that, had Golden State not unlawfully terminated Baker, it would have offered him a distributorship and he would have accepted it as of October 1, 1964. Moreover, since All American took over all of Golden State's distributors, he would have continued as a distributor for All American. In these circumstances, the Board did not exceed its remedial authority in requiring that Baker be reimbursed for what he would have earned as a distributor after October 1, 1964, and that he be offered reinstatement as a distributor.

ARGUMENT

The principal question in this case is whether the Board may properly require a *bona fide* successor employer, who acquires its predecessor's business with knowledge that the predecessor has failed to remedy its unfair labor practice in discharging an employee, may be required to reinstate the employee with back pay. Before turning to that question, however, we first show that the Board properly found that All Ameri-

can is a successor employer under the Act, and that it acquired Golden State's business with knowledge of its unremedied unfair labor practice.

I. THE BOARD PROPERLY FOUND THAT ALL AMERICAN WAS A SUCCESSOR EMPLOYER FOR PURPOSES OF THE NATIONAL LABOR RELATIONS ACT AND THAT IT ACQUIRED GOLDEN STATE'S BUSINESS WITH KNOWLEDGE THAT GOLDEN STATE HAD UNLAWFULLY DISCHARGED AN EMPLOYEE AND HAD FAILED TO REMEDY THAT UNFAIR LABOR PRACTICE

A. ALL AMERICAN IS A SUCCESSOR EMPLOYER FOR PURPOSES OF THE NATIONAL LABOR RELATIONS ACT

In *National Labor Relations Board* v. *Burns,* 406 U.S. 272, 279, the Court agreed with the Board that "a mere change of employers or of ownership in the employing industry" does not affect a bargaining obligation imposed by the Act. The Court added that, "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent," a sufficient nexus exists between the old employer and the new one to impose upon the latter the former's obligation to recognize and bargain with the employees' union representative (*id.* at 281). *A fortiori* where, as here, the new employer acquires the physical and intangible assets of his predecessor, as well as his employees, the new employer is a "successor" for the purposes of the Act.

The Justices who dissented from the Court's finding of "successorship" in *Burns* did so because, in their view, the facts showed "a mere naked shifting of a group employees from one employer to another * * *"

(*id.* at 304). However, they acknowledged successorship could properly be found where, in addition to continuity of employees, "there is continuity in the enterprise * * *" (*id.* at 305). Thus, the dissent noted that the Board and courts of appeals have properly found successorship "where the new employer purchases a part or all of the assets of the predecessor employer, *NLRB* v. *Interstate 65 Corporation*, 453 F. 2d 269 (C.A. 6 1971); where the entire business is purchased by the new employer, *NLRB* v. *McFarland*, 306 F. 2d 219 (C.A. 10 1962); and where there is merely a change in the ownership interest in a partnership that operates the employing entity, *NLRB* v. *Colten*, 105 F. 2d 179 (C.A. 6 1939)" (*id.* at 306).

Even under the standard of the dissenters in *Burns*, the Board's finding that All American is a successor employer is valid. All American acquired the machinery, buildings, accounts receivable, trade name, and real estate of the Golden State bottling operation, as well as a covenant that Golden State's principals would not compete with All American. All American retained virtually all of Golden State's employees, including the 12 distributors, and all of Golden State's supervisory and managerial employees, including the general manager, Eugene Schilling. Moreover, All American continued to manufacture the same bottled products at the same plant, using the same machinery and equipment, and to distribute those products to the same customers (*supra*, p. 4).

B. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ALL AMERICAN ACQUIRED GOLDEN STATE'S BUSINESS WITH KNOWLEDGE OF GOLDEN STATE'S UNREMEDIED UNFAIR LABOR PRACTICES

Contrary to petitioners' contention (Br. 42–48), substantial evidence supports the Board's finding, sustained by the court below (Pet. App. 33), that All American purchased Golden State's bottling business with knowledge of the Board's unfair labor practice decision against Golden State. Although Golden State's president, Crofoot, and former general manager, Schilling, testified that they did not inform All American of Golden State's unremedied obligations to Baker prior to the consummation of the sale on January 31, 1968, the Trial Examiner and the Board were warranted in rejecting these self-serving denials, and in finding that these Golden State officials had informed All American.

The Trial Examiner found that both Schilling and Crofoot had misled the Board and the court below in concealing the fact that Golden State had sold its bottling business to All American. Schilling's authority to represent Golden State ended with the sale on January 31, 1968 (A. 196–197). Yet in November 1968, more than 9 months after the sale, Schilling executed a letter and substitution of counsel for Golden State in the court below in his alleged capacity as "General Manager" of "Golden State Bottling Company" (Pet. App. 13–14; A. 82–84). A month later, as "President" of Golden State, he signed a notice to employees required by the Board's order and a certification of posting sent to the Board (Pet. App. 14; A. 92–94). The same day, Schilling offered Baker reinstatement as a driver-

salesman on behalf of Golden State (*supra*, p. 5, n. 8). Likewise, on November 24, 1969, more than 21 months after the sale, Crofoot, as "President of Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento" verified, "under penalty of perjury," the answer to the Board's original back pay specification (see App. B, *infra*, p. 44). That answer made no mention of the sale and alleged, *inter alia*, that Golden State had offered Baker reinstatement on December 11, 1968, more than 10 months after Golden State had gone out of the bottling business (*supra*, p. 5).[15]

Further inconsistencies at the hearing before the Trial Examiner justified the Examiner and the Board in disbelieving the testimony of Crofoot and Schilling that they had not advised All American of the unfair labor practice case prior to the sale. While Crofoot testified that he "hadn't remembered" (A. 129) the case when asked by All American about pending litigation, the Trial Examiner was justified in disbelieving this statement in view of Crofoot's admission that he was responsible for settling all legal matters involving Golden State and had authorized the payment of substantial legal fees in connection with that case (*supra*, p. 7, n. 10). Crofoot's claim that he had forgotten the labor

[15] That some of the documents may have been prepared by Golden State's attorney before he learned of the sale (Pet. Br. 14–15), does not neutralize the fact that Schilling and Crofoot, who did know, nonetheless signed them although they indicated that Golden State was still operating the business. Moreover, Golden State's attorney admittedly learned of the sale in "the Fall of 1969, when he was preparing a response to the original back pay specification" (Br. 14). Yet that response (A. 7–12) does not mention the sale and it was verified by E. J. Crofoot, as President of Golden State (App. B, *infra*, p. 44).

case is further undercut by the contradiction by Willeford, the successor to Baker's route, of Orofoot's claim that he was not present during the 1963 walkout (Compare A. 108 with A. 211).

Moreover, the Trial Examiner found that Schilling, who had fired Baker (*supra*, p. 5 n. 6) and had knowledge of the unfair labor practice proceeding (Br. 45), was in contact with All American *prior* to the consummation of the sale. Schilling participated in at least one of the negotiating sessions, during which he agreed to continue with All American; he met on another occasion with an All American "operations man"; and he executed the contract of sale of the bottling business as Secretary of Golden State (*supra*, p. 7 n. 10). Hence, Schilling's admitted knowledge of the unfair labor practice proceeding could properly be imputed to All American[14] not merely after (see Pet. Br. 45), but prior to, the completion of the sale.

The Board's finding is further supported by the fact that none of the officials of All American appeared as witnesses to deny knowledge of the Board's order against Golden State, nor was their absence explained (*supra*, p. 6). Silence on a factual matter particularly within the knowledge of these witnesses warranted the Board's inference that, if testimony on this issue had been elicited, it would have been un-

[14] See *Thomas Engine Corp.*, 179 NLRB 1039, 1042, affirmed *sub nom. United Automobile Workers v. National Labor Relations Board*, 442 F. 2d 1180 (C.A. 9); *Wirtz v. Ocala Gas Co.*, 336 F. 2d 236, 242 (C.A. 5).

favorable to All American. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226; *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477 482 (C.A. 3); *National Labor Relations Board* v. *Dorn's Transportation Co.*, 405 F. 2d 706, 713 (C.A. 2).

II. A SUCCESSOR EMPLOYER WHO TAKES OVER ITS PREDECESSOR'S BUSINESS WITH KNOWLEDGE THAT THE PREDECESSOR HAS DISCHARGED AN EMPLOYEE IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT AND HAS FAILED TO REMEDY THAT UNFAIR LABOR PRACTICE MAY BE REQUIRED TO REINSTATE THE EMPLOYEE WITH BACK PAY

The Board's position is that a successor employer, like All American, is required to remedy its predecessor's action in discharging an employee in violation of the National Labor Relations Act, when it acquires the business with knowledge that the predecessor has failed to remedy that unfair labor practice. The Board's interpretation of a successor employer's responsibilities has been approved both by the court below and by the Fifth Circuit in *United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544, enforcing *Perma Vinyl, supra*. We show below that the Board's view effectuates the policies of the Act and is consonant with the terms of both Section 10(e) of the Act and Rule 65(d) of the Federal Rules of Civil Procedure.[11]

[11] See Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L. Rev. 735, 813–827 (1969); Comment, *Successor Employer's Obligation to Remedy Unfair Labor Practices*, 68 Colum. L. Rev. 1602 (1968).

A. THE BOARD HAS AUTHORITY UNDER SECTION 10(C) TO ISSUE REMEDIAL ORDERS RUNNING AGAINST A SUCCESSOR EMPLOYER WHO ACQUIRES THE EMPLOYING ENTITY WITH KNOWLEDGE OF THE PREDECESSOR'S UNREMEDIED UNFAIR LABOR PRACTICE

Section 10(c) of the Act states:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

Petitioners contend that the phrase "person named in the complaint" in Section 10(c) limits the Board's remedial powers to the actual perpetrator of an unfair labor practice and prevents the Board from issuing orders binding a successor who did not itself commit the original unlawful act (Br. 33).

Section 10(c) must be read in the light of "'the provisions of the whole law, and * * * its object and policy.'" *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285; accord: *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288. Congress could not "catalogue all the devices and stratagems for circumventing the policies of the Act," nor "define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations"—but instead left the Board with broad discretion to adapt "means to end." *Phelps Dodge Corp.* v.

National Labor Relations Board, 313 U.S. 177, 194. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540. These well-settled principles support the Board's order here.

It is the proper function of a Board remedy to seek "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal [practices]." *Phelps Dodge, supra*, 313 U.S. at 194. The attainment of this objective is impaired where the employing enterprise changes hands subsequent to the commission of unfair labor practices, unless the new employer is subject to the Board's remedial powers. Once the offending employer has relinquished control over the employment relationship, it no longer has power to take most of the steps required to undo the effects of its unfair labor practices.

This Court has recognized that a Board order under Section 10(c), which covered the employer named in the complaint and "its officers, agents, successors, and assigns," could be applied not only to a new employer which is "merely a disguised continuance of the old employer" (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 106), but also, " 'in appropriate circumstances, * * * [to] those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons.*' " *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14 (emphasis added). The

Board's remedial power under Section 10(c) may also properly encompass a *bona fide* purchaser who continues the employing entity which was the locus of the unfair labor practices, where it acquires that entity with knowledge that the predecessor has failed to remedy unfair labor practices."[18]

1. The Board explained the reasons for imposing these obligations upon a successor employer in *Perma Vinyl Corp.*, 164 NLRB 968, 969:

> When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices effectively. * * *

Only the new employer can reinstate to his former position an employee who has been discriminatorily

[18] Although the Court in *Southport*, *supra*, stated that "a *bona fide* discontinuance and a true change of ownership * * * would terminate the duty of reinstatement created by the Board's order" (315 U.S. at 106), the Court had no occasion to focus on the question whether a distinction could properly be drawn between a *bona fide* purchaser who becomes a successor employer for purposes of the Act and one who does not. Moreover, as shown in the text, in *Regal Knitwear*, the Court modified the broad statement in *Southport* by indicating that the Board's order could properly bind those to whom the business has been transferred, not only as a means of evading the judgment, but "for other reasons" (324 U.S. at 14).

discharged by the old employer. Moreover, since the old employer may be insolvent or his assets may be difficulty to reach, imposing liability for back pay on the new employer may be the only way of insuring prompt and certain recovery of that sum."

On the other hand, the successor's refusal to comply with the Board's order is likely to be viewed by the employees—who have remained essentially the same—as a continuation of the predecessor's unlawful labor policies. This would be particularly true here since All American hired, as general manager and president of the bottling operation, the same official, Schilling, who unlawfully discharged Baker. Such an atmosphere would be likely to have a continuing chilling effect upon the employees in the future exercise of their Section 7 rights. See *Darlington Mfg. Co.* v. *National Labor Relations Board*, 397 F. 2d 760, 772–773 (C.A. 4), certiorari denied, 393 U.S. 1023. Accordingly, unless the successor were required to remedy its predecessor's unfair labor practices, it would benefit from

[19] We show, *infra*, pp. 34–38, that the Board may properly make the old employer jointly liable for the back pay.

In *Perma Vinyl* itself, the Board did not impose any back pay liability on the successor because, at the time of the sale, the predecessor had already paid the amount of back pay owing to the discriminatees; the then applicable law had imposed no obligation upon a successor regarding its predecessor's unremedied unfair labor practices (164 NLRB at 970); and the Board wished to give its new ruling "prospective application" (*United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544, 548 (C.A. 5)). None of these circumstances is present here.

that unlawful conduct by acquiring employees who are likely to be inhibited thereby.[20]

2. The imposition of remedial responsibility on a successor employer does not impose an undue hardship on it. Since the successor has elected to continue the same operation with the same work force, it is likely to need the employee who was discriminatorily discharged. *United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544, 548

[20] Petitioners contend (Br. 41) that it is reasonable to impose a bargaining obligation on a successor employer where the unit and the employee complement remain essentially the same (as in *Burns*, *supra*), for "it is the employees' action and theirs alone, which determines the representative with whom the employer must bargain." Petitioners add, however, that the identity of the employing entity has no bearing on the question whether it is appropriate to fasten responsibility on the successor for remedying the predecessor's unfair labor practices, since the "successor employer is surely entitled to a fair chance to establish its own independent image with its new employees, and to articulate and demonstrate its own labor and management policies" (Br. 42). But, as shown in the text above, where the employing entity remains the same, irrespective of the new employer's good intentions, his failure to reinstate, with back pay, an employee who had been unlawfully discharged by the predecessor would be likely to be viewed by the remaining employees as a continuation of the predecessor's anti-union policies, and thereby deter them from exercising their organizational rights in the future. The likelihood of such deterrence is particularly great where, as here, the successor retains the manager who was responsible for the predecessor's unfair labor practice. Moreover, to require the successor to remedy the predecessor's unfair labor practice does not preclude the successor from attempting to persuade the employees that its labor policies were different from those of its predecessor's; indeed, by remedying the predecessor's unfair labor, and thereby wiping the slate clean, that effort could well be facilitated.

(C.A. 5).[21] Should the discriminatee prove to be an unsatisfactory employee, the successor could discharge him for cause. Moreover, since liability is imposed on the successor only where he acquires the business with knowledge of the predecessor's unremedied unfair labor practices, the successor's:

> potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices. [*Perma Vinyl, supra*, 164 NLRB at 969, footnote omitted.]

Indeed, in this case the sales contract contained a representation and warranty by Golden State that there were no actions, suits, or proceedings pending against it. In addition, President Crofoot of Golden State subsequently orally agreed to indemnify All American against any losses arising from the Board's unfair labor practice proceeding (Pet. App. 15; A. 68, 121–124). All American could thus obtain reimbursement from Golden State for any liability it incurred by compliance with the Board's order.

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[21] Contrary to petitioners' contention (Br. 40), the successor would not have to create a job for the discriminatee if his job, in the meantime, had been discontinued for valid economic considerations. See *United States Pipe and Foundry, supra*, 398 F. 2d at 548. In such event, the successor's obligation is no greater than the predecessor's would have been—*i.e.*, to put the discriminatee on a preferential hiring list for future job openings. See *Thomas Engine Corp.*, 179 NLRB 1029, 1030, affirmed *sub nom. United Automobile Workers* v. *National Labor Relations Board*, 442 F. 2d 1180 (C.A. 9).

3. The reasoning of this Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, further supports the Board's conclusion that Section 10(c) of the Act empowers it to require a successor employer, who acquires the business with knowledge of the predecessor's unremedied unfair labor practices, to remedy those unfair labor practices. In *Wiley*, which was a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, the Court held that, where there is a substantial continuity in the business enterprise, a successor employer must arbitrate a union's claim that it is bound by and has violated the collective agreement between the union and the predecessor employer. Among the considerations advanced by the Court in support of its holding was the need to provide "some protection to employees from a sudden change in the employment relationship" (*id.* at 549):

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. * * *

In the absence of a remedy such as the Board has fashioned here, "the employee victims of unfair labor

practices * * * are * * * without meaningful remedy when title to the employing business operation changes hands." *Perma Vinyl, supra,* 164 NLRB at 969. Accordingly, "[t]he objectives of national labor policy * * * require that the rightful prerogative of owners independently to rearrange their businesses * * * [must] be balanced by some protection to the employees * * *." *Wiley, supra,* 376 U.S. at 549. The Board has achieved such a balance by requiring a successor employer, who takes with knowledge, to remedy its predecessor's unfair labor practices.

The importance of *Wiley* to the issues presented here has not been diminished by this Court's recent decision in *National Labor Relations Board* v. *Burns,* 406 U.S. 272. In *Burns,* the successor was merely "doing the same work in the same place with the same employees as his predecessor" (*id.* at 291); it had "purchased nothing from [the predecessor] and become liable for none of its financial obligations" (*id.* at 286). In these circumstances, the Court held that *Wiley* did not override the "freedom of contract" policy reflected in Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), to such an extent as to justify imposing on the successor employer a duty, not only to bargain with the union representing the predecessor's employees, but to honor the predecessor's collective bargaining agreement.[22]

[22] In *Burns,* the Court noted the limitations of its holding stating that, "in a variety of circumstances involving a merger, stock acquisition, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract" (406 U.S. at 291).

In the present case, however, there is no interference with the successor's freedom to bargain collectively, which Section 8(d) protects. Rather the Board is dealing with a successor's conduct in failing to remedy his predecessor's unfair labor practice—which conduct, albeit passive, has perpetuated an interference with the employees' organizational rights under Section 7. Even the dissenters in *Burns,* who were unwilling to find successorship on the facts there presented, specifically acknowledged, referring to the quotation from *Wiley, supra,* p. 28, that "employees are indeed entitled to a measure of protection against change in the employing entity where [as here] the new employer continues to make use of tangible or intangible assets used in carrying on the business of the first employer" (406 U.S. at 302).

B. RULE 65(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT BAR THE BOARD FROM REQUIRING A SUCCESSOR EMPLOYER TO REMEDY ITS PREDECESSOR'S UNFAIR LABOR PRACTICES

Petitioners further contend that Fed.R.Civ.P. 65(d) prohibits the Board from issuing a remedial order binding upon a successor, such as All American. That Rule (App. A, *infra,* p. 43) provides that orders granting injunctions bind only the parties to an action and "persons in active concert or participation with them" who have actual notice of the order.

In *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9, the Court, in affirming the enforcement of a Board order directed to a named employer and its "successors and assigns," stated that the latter phrase could not extend the order beyond the perimeters permitted by Rule 65(d) (*id.* at 14). As noted

previously (*supra*, p. 23), the Court indicated that the Board's order could properly bind those who operate as "'merely a disguised continuance of the old employer,'" and, in appropriate circumstances, "'those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons*'" (*id.* at 14–15, emphasis added). The Court concluded that whether one is covered by the order as a "'successor or assign' depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order" (*id.* at 15).

Under Rule 65(d) an injunction may bind persons identified in interest, or in "privity," with the parties to an action.[22] Thus, those who acquire interests in property which is the subject of litigation are bound by, or entitled to the benefit of, the judgment subsequently entered.[23] In *United Gilpin Corp.* v. *Wilmore*, 100 Colo. 453, 68 P. 2d 34, an injunction which had issued against a mining company and its "successors and assigns," permanently enjoining them from discharging waste products in a stream, was held to bind a subsequent *bona fide* purchaser of the mining company, for the injunctive order was in effect "a restriction or restraint running with future operations of

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[22] Rule 65(d) "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear*, *supra*, 324 U.S. at 14. See also *United States* v. *Dean Mfg. Co.*, 71 F. Supp. 96, 98 (W.D. Mo.).

[23] *Behrens* v. *Skelly*, 173 F. 2d 715, 718 (C.A. 3); ALI, *Restatement of Law—Judgments*, § 89 (1942).

the property involved" (68 P. 2d at 35).[24] Similarly, in *Interstate Commerce Commission* v. *Western N.Y. & P.R. Co.*, 82 Fed. 192 (Cir. Ct., W.D. Pa.), a Commission order prohibiting unjust discrimination which ran against one railroad company was held to bind new companies which, through reorganization, took over the old company:

> Here the new railroad companies have succeeded to the enjoyment of public franchises, and they have voluntarily taken upon themselves the performance of reciprocal public duties. This proceeding is for the enforcement of a public duty which is inseparable from the ownership of the railroad. * * * [82 Fed. at 194.][25]

Similar considerations obtain in "the federal common law of labor relations." As the dissent in *Burns* observed (406 U.S. at 305):

> [T]he doctrine of successorship in the federal common law of labor relations accords to employees the same general protection against

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[24] See also *J.R. Clark Co.* v. *Jones & Laughlin Steel Corp.*, 186 F. Supp. 22, 24 (S.D. Ind.), affirmed, 288 F. 2d 279, 280 (C.A. 7) (purchaser of company with knowledge that it was involved in patent infringement suit bound by the judgment entered in that suit); *Rodman* v. *Rogers*, 109 F. 2d 520, 521 (C.A. 6) (injunction barring an individual from using explosives in the operation of quarry binding on corporation to whom quarry was transferred with knowledge of the injunction); *Rivera* v. *Lawton*, 35 F. 2d 823 (C.A. 1) (purchaser of property with knowledge of injunction restricting house construction bound by that injunction).

[25] A decree may bind a public official who, although not a party to the original suit, succeeds to the powers exercised by the person named in the decree. See *Wright* v. *County School Board*, 309 F. Supp. 671, 677 (E.D. Va.), affirmed, 407 U.S. 451; *Lucy* v. *Adams*, 224 F. Supp. 79 (N.D. Ala.), affirmed *sub nom. McCorvey* v. *Lucy*, 336 F. 2d 892 (C.A. 5).

transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to nonlabor-related claimants against the same entity * * *.

Applying these principles here, and in the interest of fully effectuating the policies of the Act,[11] we submit that a purchaser, who takes over the employing enterprise which was the locus of the predecessor's unfair labor practices, with knowledge that those unfair labor practices are unremedied, has stepped into the predecessor's shoes to a sufficient extent to be deemed identified in interest, or in "privity," with the predecessor for purposes of Rule 65(d).

This conclusion will not subvert the policy, which underlies Rule 65(d), of not having "order[s] or injunction[s] so broad as to make punishment the conduct of persons who act independently and whose rights have not been adjudged according to law * * *" (*Regal Knitwear, supra*, 324 U.S. at 13).

In *Perma Vinyl, supra*, 164 NLRB at 969, the Board ruled that:

> no * * * adjudication of [the successor's] liability can be made without affording the bona fide purchaser a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices. The successor would also be entitled, of course, to be heard against the enforcement of any order issued against it. * * *

[11] The foregoing principles "may be applied in fuller measure in furtherance of the public interest * * * than if only private interests were involved." *Walling* v. *Reuter*, 321 U.S. 671, 674–675.

The procedure followed by the Board here insured that All American's rights were adjudged "according to law." Thus, All American was joined with Golden State as a party to the supplemental back pay proceeding. The Board served All American with the Notice of Hearing, along with the back pay specification asserting its joint and several liability for its predecessor's unremedied unfair labor practice. All American appeared at the hearing, represented by counsel. During the hearing, All American had a full opportunity, which it took, to introduce evidence on whether it was a successor employer and whether it had knowledge of the unfair labor practice. All American's counsel filed with the Board exceptions to the Trial Examiner's decision and supporting and supplemental briefs. All American also obtained review of the Board's decision in the court below. In these circumstances, there was full compliance with Rule 65(d).[25]

III. THE BOARD PROPERLY MADE GOLDEN STATE JOINTLY LIABLE WITH ALL AMERICAN FOR BACK PAY ACCRUING AFTER THE SALE

Petitioners contend (Br. 27–31) that the Board lacked authority to make Golden State jointly liable with All American for back pay accruing to Baker

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[25] *National Labor Relations Board* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (C.A. 10), relied on by petitioners (Br. 34–35), is distinguishable in this respect. There, the successor employer was "adjudged of wrongdoing on its part without complaint, notice, full opportunity to present its defense and the other essential requirements of due process" (*id.* at 237).

after the date of the sale." However, as the court below noted (Pet. App. 33–34):

> Golden State agreed to indemnify All American for any liability imposed upon All American for back pay, and we have upheld the Board's imposition of such liability upon All American for the post-acquisition period. Accordingly, Golden State concedes that it is liable for such wages by virtue of its agreement, whether or not it would also be liable absent that agreement.

The agreement to indemnify All American was unequivocal. Not only did Golden State warrant against any pending litigation, but its president, Crofoot, testified (A. 123):

> I discussed [indemnification of All American against losses in this proceeding] * * * with Mr. Schilling and told him that I thought the contract covered our liability for any loss that might be sustained, but that if it didn't I would be happy to so guarantee.

The dispute over the Board's power to require Golden State to give Baker back pay accruing after the sale is thus academic, and the court below properly concluded that it did not need to resolve it.

In any event, we submit that the liability of a predecessor, like Golden State, for back pay does not end with the transfer of its business to a successor. The imposition of this obligation upon a predecessor is con-

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" Contrary to petitioners' suggestion (Br. 22, 28, 31), the Board's order imposes a reinstatement obligation only on All American (Pet. App. 16–17, 20). The back pay liability of both Golden State and All American will terminate upon a valid offer of reinstatement by All American.

sistent with the Board's authority to fashion remedies which will effectuate the policies of the Act (*Phelps Dodge Corp.* v. *National Labor Relations Board*, *supra*, 313 U.S. at 194–195), and is not barred by *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263.

In *Darlington*, the Court held that it is not an unfair labor practice for an employer to liquidate its entire business, even if the liquidation is motivated by vindictiveness toward the union. It does not follow, however, that the employer may thereby relieve itself of all continuing liability for an unfair labor practice—such as a wrongful discharge—committed *prior to* the liquidation [30] and wholly unrelated to it. Thus, where the employer previously has unlawfully discharged an employee, it has created a situation unrelated to the liquidation, which continues after the liquidation—*i.e.*, the employee remains unemployed as a result of the employer's unlawful action.[31] While the liquidation may preclude the employer from reinstating the employee, it does not prevent it from compensating the employee for the monetary loss which

[30] The Court noted that (380 U.S. at 272, n. 14): "The Darlington property and equipment could not be sold as a unit, and were eventually auctioned off piecemeal. We therefore are not confronted with a sale of a going concern, which might present different considerations under § 8(a)(3) and (5). Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543; *Labor Board* v. *Deena Artware, Inc.*, 361 U.S. 398."

[31] Here, but for Golden State's unfair labor practice, Baker would have become a distributor on October 1, 1964, and, as such, there is every likelihood that he would have been taken over by All American, since it took over the other Golden State distributors (*supra*, pp. 4, 8–9).

he continues to incur as a result of the employer's earlier misconduct.

Accordingly, and in view of the nature of a back pay order,[32] the Board may properly subject an employer who liquidates or sells its business to liability for back pay accruing subsequent to such liquidation or sale. See *Darlington Mfg. Co.* v. *National Labor Relations Board*, 397 F. 2d 760, 773 (C.A. 4), certiorari denied, 393 U.S. 1023; cf. *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261, 264–265 (C.A. 8). This is particularly justified where, as here, the employer, prior to the liquidation or sale, failed to make a reasonable or good faith effort to undo the effects of its unlawful conduct.[33]

Nor is a different conclusion required because of the

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[32] "A backpay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27.

[33] The court below enforced the Board's order with respect to Baker on December 2, 1965. From that date until the sale on January 31, 1968, Golden State made no attempt to terminate its back pay liability by offering Baker reinstatement. Nor did Golden State attempt to place Baker in its other enterprises or with any other employer. Golden State did not even inform Baker of the sale of the bottling company, thereby impeding him in applying for a position with All American. Golden State's first offer of reinstatement did not occur until December 11, 1968, and it was invalid (see *supra*, p. 5, n. 8). Moreover, contrary to petitioners' suggestion (Br. 8–9), the belatedness of the offer was not excused by the fact that the court below did not dispose of the Board's petition for rehearing until November 27, 1968. The Board's petition for rehearing involved a lockout issue which was wholly unrelated to the unfair labor practice involving Baker (*supra*, p. 3, n. 3).

Board's view, expressed above, that, where the successor has knowledge of the predecessor's unfair labor practices, the selling price may reflect the potential liability which such practices may cause. The Board believes that the public policy reflected in the Act that employees should be made whole for injuries they suffer as a result of unfair labor practices justifies requiring the predecessor, as well as the successor, to reimburse the employee for earnings lost as a consequence of the predecessor's violations. Cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 54–55.

IV. THE BOARD PROPERLY DETERMINED THE AMOUNT OF BACK PAY DUE THE UNLAWFULLY DISCHARGED EMPLOYEE AND ORDERED THAT HE BE REINSTATED AS A DISTRIBUTOR

Petitioners concede (Br. 11, 51) that there is substantial evidence to support the Board's finding that, had Golden State not unlawfully terminated Baker, it would have offered him an independent distributorship and he would have accepted it and become a distributor as of October 1, 1964. Petitioners contend, however, that the Board exceeded its authority by failing to terminate back pay liability as of that date, and instead adding an amount to reflect Baker's earnings as a distributor after October 1, 1964, and requiring that he be offered reinstatement to that position.

Contrary to petitioners' assertion (Br. 51–52), even if Baker's becoming a distributor would have changed his status from "employee" to "independent contrac-

tor,"[34] this would not have terminated his right to receive back pay. As a distributor, Baker would not have wilfully lost earnings that could have mitigated back pay liability, nor would he have removed himself from the labor market.[35] Instead, he would still have been working for Golden State, and its successor, All American, under an arrangement which they sanctioned. He would have performed a function closely connected with, and necessary to the continued operation of, the bottling business—distributing the same products to the same customers whom he serviced as a driver-salesman.

Petitioners also contend (Br. 52–56) that the Board had no authority to require that Baker be offered reinstatement as a distributor. As shown (*supra*, p. 23), the Board, in issuing a remedial order under Section 10(c) of the Act, has power to place the parties, so far as

[34] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes an independent contractor from the definition of "employee." The Board found it unnecessary to resolve the question whether the distributors were employees or independent contractors (Pet. App. 20–22).

[35] In *Mastro Plastics Corp.*, 136 NLRB 1342, 1350, the Board stated that a claim for back pay should be disallowed for any period in which the employee quit an interim job with another employer, "if the evidence supports a finding that the claimant would have left Respondent's plant for the same reason that he left the interim job * * *." The Board added (*ibid.*):

"A claimant who goes into business on his own is treated similarly to one who obtains interim employment; in his case his net profits are treated as interim earnings. * * *"

"Self-employment does not in and of itself indicate withdrawal from the labor market. *Brown and Root, Inc., et al.*, 132 NLRB 486. See also *McCann Steel Co.*, 203 NLRB No. 115, 83 LRRM 1175, 1177, May 18, 1973.

possible, where they would have been if the unfair labor practice had not occurred. Since Baker, if he had not been unlawfully discharged, would have become a distributor for Golden State and would have continued as a distributor for All American, the Board's remedial power is broad enough to permit it to require that Baker be reinstated as a distributor. Only then could the *status quo ante* be restored."[36]

Finally, petitioners contend that the Board, in requiring that Baker be reimbursed for what he would have earned as a distributor, exceeded its authority by awarding "consequential damages, based upon anticipated, and wholly speculative profits which might have been earned in a hypothetical business" (Br. 56). It is settled that the Board, in computing gross back pay, need only reasonably approximate the back pay which an employee would have earned had he not been un-

[36] See *National Labor Relations Board* v. *Bell Aircraft Corp.*, 206 F. 2d 235, 236–237 (C.A. 2), where the court upheld a Board order requiring the employer, who had unlawfully denied an employee promotion to a supervisory job, to promote the employee to supervisor and pay him the wages he lost. Supervisors, like independent contractors, are excluded from the definition of "employee" (Section 2(3) of the Act, 29 U.S.C. 152(3)).

Nor may this case be distinguished on the ground (Pet. Br. 54) that there "the Respondent, as the employer, continued to administer employment policy and pay wages, on the one hand, and the discriminatee continued on, without further interruption, as an employee, albeit in an improved situation." As shown (pp. 4, 17), the distributorships here were an integral part of the bottling operation, and the individual distributors continued, under essentially similar conditions, to perform for that operation the same functions which they had performed as driver-salesmen. Indeed, two of the driver-salesmen who became distributors eventually returned to their former status of driver-salesmen (Pet. Br. 59).

lawfully denied employment by his employer." The Board concluded that Baker's gross back pay from October 1, 1964, when he would have become a distributor for Golden State, should be computed on the basis of the net profits of Thorne, petitioners' most successful distributor and the employee whose earnings as a driver-salesman were most comparable to Baker's during Baker's 14 months of employment with Golden State (*supra*, pp. 3–4). Since the earnings of the distributors varied depending on their ability and initiative (see A. 239–240), the use of the earnings of a comparable distributor, Thorne, as a basis for computing Baker's gross back pay was fair and reasonable.[37]

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[37] *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8); *National Labor Relations Board* v. *Charley Toppino and Sons*, 358 F. 2d 94, 97 (C.A. 5); *National Labor Relations Board* v. *Rice Lake Creamery Co.*, 365 F. 2d 888, 891 (C.A. D.C.).

[38] See *National Labor Relations Board* v. *East Texas Steel Castings Co.*, 281 F. 2d 686, 687 (C.A. 5); *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 375 F. 2d 402, 403 (C.A. 5), certiorari denied, 389 U.S. 859.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1973.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> Sec. 10 * * *
>
> * * * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: * * *

The relevant provisions of the Federal Rules of Civil Procedure, 28 U.S.C., are as follows:

> Rule 65(d):
>
> Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

APPENDIX B

The verification attached to the answer to the first back pay specification (A. 7-12) is as follows:

(Verification—446, 2015.5 C. C. P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I am the President of Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento, Respondent in the above certified action; I have read the foregoing Answer of Respondent to Backpay Specification and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November , 1969 at Sacramento, California.

E. J. CROFOOT.

STATE OF CALIFORNIA,
County of Sacramento, ss:

On this 24th day of November in the year one thousand nine hundred and 69 before me, Raymon D. Cross, a Notary Public, State of California, duly commissioned and sworn, personally appeared E. J. Crofoot known to me to be the person whose name subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the_____County of Sacramento the day and year in this certificate first above written.

RAYMON D. CROSS,
Notary Public, State of California.

My Commission Expires June 21, 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972